Supreme Court, U.S.
FILED
06-19 JUN 28 2006
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

Shalaan Fisher,

Petitioner

v.

Christian Fisher and Andrea Fisher,

Respondents.

In the Matter of Sara Fox, a Minor.

On Petition For Writ of Certiorari
To the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

Timothy M. Holloway
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Taylor, MI 48180
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QUESTIONS PRESENTED FOR REVIEW

I. Whether a liberty interest, protected by Due Process, exists when a person has guardianship and physical custody of her blood-related minor ward?

II. Whether Due Process is violated by deprivation of the liberty interest by a Probate Court, without any pre-proceeding notice that the Probate Court may extinguish the interest, without any type of hearing where evidence is admitted, without any apparent consideration of factors deemed important by the State, such as the welfare of the child, and where the Probate Court apparently based its decision on its desire to expedite a visitation schedule for various relatives?

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company involved in this matter, as a party or otherwise connected to a party. Therefore, no parent or publicly held company owns 10% or more of any corporation's stock.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The Michigan Court of Appeals orders denying leave to appeal and denying reconsideration were not published. The Michigan Supreme Court order denying leave to appeal may be found at 474 Mich. 851 (2005). The Michigan Supreme Court order denying reconsideration may be found at 474 Mich. 1043 (2006).

JURISDICTION

The statutory provision which provides the Court with jurisdiction to grant a writ of certiorari to review the order of the Michigan Supreme Court is 28 U.S.C. § 1254(1).

This matter initially involved proceedings in the Wayne County Probate Court (Wayne PC # 2002-651094-GM). On February 20, 2004, Petitioner Fisher timely appealed to the Wayne County Circuit Court (Wayne CC # 04-405143) from the January 30, 2004, order of the Wayne County Probate Court. M.C.R. 7.101(A) & (B)(1)(a). The Wayne County Circuit Court denied the appeal in an Order and Opinion dated October 19, 2004.

Appellate jurisdiction in the Michigan Court of Appeals (Mich. COA # 258993) was based on the application for leave to appeal the Order and Opinion of the Wayne County Circuit Court. The application was timely filed on November 9, 2004. under M.C.R. 7.205(A).

The Michigan Court of Appeals order denying leave to appeal was entered on May 18, 2005. An application to the Michigan Supreme Court (Mich. S.Ct. # 128992), for leave to appeal the Michigan Court, was timely filed on June 29, 2005. M.C.R. 7.302(C)(2). The Michigan Supreme Court denied the application on August 12, 2005. A timely filed motion for reconsideration was filed with the Michigan

Supreme Court on September 2, 2005. M.C.R. 7.313(E). The Michigan Supreme Court denied the motion for reconsideration on January 30, 2006.

Pursuant to Application No. 05A963, an extension of time to file this petition of certiorari with U.S. Supreme Court was granted on April 25, 2006. The time was extended to and including June 29, 2006, by Justice Stevens.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

M.C.L. 700.5101 General definitions.

Sec. 5101.

As used in parts 1 to 4 of this article:

(a) "Best interests of the minor" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(i) The love, affection, and other emotional ties existing between the parties involved and the child.

(ii) The capacity and disposition of the parties involved to

give the child love, affection, and guidance and to continue educating and raising the child in the child's religion or creed, if any.

(iii) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(iv) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(v) The permanence, as a family unit, of the existing or proposed custodial home.

(vi) The moral fitness of the parties involved.

(vii) The mental and physical health of the parties involved.

(viii) The child's home, school, and community record.

(ix) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.

(x) The party's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents.

(xi) Domestic violence regardless of whether the violence is directed against or witnessed by the child.

(xii) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or parenting time.

(b) "Claim" includes, in respect to a protected individual, a liability of the protected individual, whether arising in

contract, tort, or otherwise, and a liability of the estate that arises at or after the appointment of a conservator, including expenses of administration.

(c) "Conservator" includes, but is not limited to, a limited conservator described in section 5419(1).

(d) "Visitor" means an individual appointed in a guardianship or protective proceeding who is trained in law, nursing, or social work, is an officer, employee, or special appointee of the court, and has no personal interest in the proceeding.

M.C.L. 700.5204 Court appointment of guardian of minor; conditions for appointment.

Sec. 5204.

(1) A person interested in the welfare of a minor, or a minor if 14 years of age or older, may petition for the appointment of a guardian for the minor. The court may order the family independence agency or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation.

(2) The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:

(a) The parental rights of both parents or the surviving parent are terminated or suspended by prior court order, by judgment of divorce or separate maintenance, by death, by judicial determination of mental incompetency, by disappearance, or by confinement in a place of detention.

(b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal

authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.

(c) All of the following:

(i) The minor's biological parents have never been married to one another.

(ii) The minor's parent who has custody of the minor dies or is missing and the other parent has not been granted legal custody under court order.

(iii) The person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

(3) A minor's limited guardian may petition to be appointed a guardian for that minor, except that the petition shall not be based upon suspension of parental rights by the order that appointed that person the limited guardian for that minor.

(4) A guardian appointed under section 5202 whose appointment is not prevented or nullified under section 5203 has priority over a guardian who may be appointed by the court. The court may proceed with an appointment upon a finding that a guardian appointed in a manner described in section 5202 has failed to accept the appointment within 28 days after the notice of the guardianship proceeding.

(5) For the minor ward's welfare, the court may at any time order the minor ward's parents to pay reasonable support and order reasonable parenting time and contact of the minor ward with his or her parents.

M.C.L. 700.5208. Petition to terminate guardianship of minor.

Sec. 5208. (1) A minor's parent or parents may petition the court to terminate a guardianship for the minor as follows:

(a) If the guardianship is a limited guardianship, the parents or the sole parent with a right to custody of the minor.

(b) If the guardianship was established under section 5204, the minor's parent or parents.

(2) If a petition is filed to terminate a guardianship under this section, the court may do 1 or more of the following:

(a) Order the family independence agency or a court employee or agent to conduct an investigation and file a written report of the investigation regarding the best interests of the minor or give testimony concerning the investigation.

(b) Utilize the community resources in behavioral sciences and other professions in the investigation and study of the best interests of the minor and consider their recommendations for the disposition of the petition.

(c) Appoint a guardian ad litem or attorney to represent the minor.

(d) Take any other action considered necessary in a particular case.

(3) This section and section 5209 apply to all guardianships established before, on, or after the effective date of this section.

M.C.L. 700.5215. Powers and duties of guardian of minor.

Sec. 5215. A minor's guardian has the powers and responsibilities of a parent who is not deprived of custody of the parent's minor and unemancipated child, except that a guardian is not legally obligated to provide for the ward from the guardian's own money and is not liable to third persons by

reason of the parental relationship for the ward's acts. A guardian has all of the following powers and duties:

(a) The guardian shall take reasonable care of a ward's personal effects and commence a protective proceeding if necessary to protect the ward's other property. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property.

(b) The guardian may receive money payable for the ward's support to the ward's parent, guardian, or custodian under the terms of a statutory benefit or insurance system, or a private contract, devise, trust, conservatorship, or custodianship. The guardian may receive the ward's money or property paid or delivered under section 5102. Money or property received under that section shall be applied to the ward's current needs for support, care, and education. The guardian shall exercise due care to conserve any excess for the ward's future needs unless a conservator is appointed for the ward's estate, in which case the excess shall be paid over at least annually to the conservator. The guardian shall not use that money or property for compensation for the guardian's services except as approved by court order or as determined by a duly appointed conservator other than the guardian. A guardian may institute a proceeding to compel a person's performance of a duty to support the ward or to pay money for the ward's welfare.

(c) The guardian shall facilitate the ward's education and social or other activities, and shall authorize medical or other

professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would be illegal for a parent to have consented.

(d) A guardian may consent to a minor ward's marriage.

(e) Subject to the conditions and restrictions of chapter X of the probate code of 1939, *1939 PA 288, MCL 710.21* to *710.70*, a guardian may consent to marriage or adoption of a minor ward or to the release of a minor ward for adoption.

(f) A guardian must report the condition of the ward and of the ward's estate that is subject to the guardian's possession or control as ordered by the court on petition of a person interested in the minor's welfare or as required by court rule. The report must detail the condition of the ward, medical or mental health treatment or care to which the ward was subjected, and what reason, if any, exists for the continuation of the guardianship.

(g) Within 14 days after a change in the ward's place of residence, the guardian shall give to the court notice of the ward's new address.

STATEMENT OF THE CASE

Petitioner Fisher seeks relief from the order and opinion of the Wayne County Circuit Court and the orders of the Michigan Court of Appeals and Michigan Supreme Court denying leave to appeal. Fisher sought reversal of the Wayne County Circuit Court's affirmance of the Wayne County Probate Court.

Pursuant to a court proceeding held on July 24, 2002, the Wayne County Probate Court appointed Fisher guardian

of Sara Fox, the daughter of Fisher's niece. The niece, Tamara Fox, was deceased at the time. The widowed father of the child, Scott Fox, a drug addict, had disappeared. Under the relevant statute, M.C.L. 700.5204(2)(a), the substantive predicates necessary to appoint Petitioner Fisher as guardian were present: (a) the parental rights of the child's mother had been terminated by death; and (b) the parental rights of the child's father had been terminated or suspended by disappearance. Id. These facts were brought out at the July 24, 2002, hearing.

After the July 24, 2002, hearing appointing Petitioner Fisher guardian, relatives filed petitions for temporary guardianship. On September 27, 2002, the Probate Court terminated Fisher's guardianship, during a proceeding in court, without any type of evidentiary hearing. Fisher was not able to present evidence or confront and cross-examine any allegation. Also, there was no notice to Fisher that the Probate Court would possibly terminate the guardianship at that proceeding. The court proceeding merely involved the court's addressing a few questions to relatives of the child and their attorneys regarding visitation and a possible civil suit for the deceased mother of the ward.

After the discussion concerning visitation at the September 27, 2002, proceeding, the Probate Court, apparently wishing to facilitate a compromised visitation schedule, abruptly terminated the permanent guardianship of Petitioner Fisher and appointed Christian Fisher as temporary guardian. There was nothing asked of substance regarding the welfare of the child.

Throughout the proceedings in the Wayne County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court, Petitioner Fisher argued that the Wayne County Probate Court's termination of Petitioner

Fisher's guardianship violated Due Process.

The Wayne County Circuit Court addressed the matter by misstating that Petitioner Fisher's guardianship was originally a temporary guardianship. However, the transcript of the July 24, 2002, proceeding and the Probate Court's July 24, 2002, Letters of Guardianship clearly indicate that the guardianship was not temporary. The Michigan Court of Appeals and Michigan Supreme Court denied leave in a perfunctory manner.

REASONS FOR GRANTING THE WRIT

Petitioner Fisher asserts that the specific issue of whether a legal guardian of a minor, related by blood to the minor, has a liberty interest that is entitled to Due Process procedural protections is important. As indicated below, the Court has suggested, but not directly stated, that this relationship does involve a liberty interest. The issue involves a question of national significance that the Court should directly answer.

The following is based on the two-step test for procedural Due Process issues. "We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State, *Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972);* the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient, *Hewitt v. Helms, 459 U.S., at 472."* Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

I. Fisher's Guardianship of Her Blood-Related Minor Ward Was a Protected Liberty Interest.

In Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977), the Court pondered, without deciding, whether foster parents have a liberty interest, protected by the Due Process Clause, in their relationship with a foster child. In considering that question, the Court analyzed case law in a manner suggesting that a legal guardian, related by blood to the minor ward (as opposed to a foster parent unrelated to the child), has a liberty interest similar to that of a natural parent.

> "It is cardinal with us that the custody, care and nurture of a child reside first in the

> parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

Smith, 431 U.S. at 843 (footnote omitted)

> The scope of these rights ***extends beyond natural parents.*** The "parent" in *Prince* itself, for example, was the ***child's aunt and legal custodian.*** *321 U.S., at 159.* And see *Moore v. East Cleveland, ante,* at 504-506 (plurality opinion) 507-511 (BRENNAN, J., concurring).

Smith, 431 U.S. at 843, n. 49 (emphasis added) citing Prince v. Massachusetts, 321 U.S. 158, (1944) and Moore v. East Cleveland, 431 U.S. 494 (1977).

The fact that Due Process protects family relationships beyond the immediate nuclear family was specifically recognized, in a context other than guardianship, in the plurality opinion and concurring opinion in Moore. In Moore, an East Cleveland ordinance, preventing a grandparent from living in the same household as her grandchildren, was at issue. In analyzing the issue, the plurality opinion of the Court indicated that the Due Process protections for family relationships is not cut off, in an arbitrary manner, at the boundary of the traditional nuclear family. Moore, 431 U.S. at 502 (plurality). The Court's "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore, 431 U.S. at 503 (plurality) (footnote omitted). Part of the justification for extending Due Process protections to family relationships, beyond the traditional nuclear family, is based on the fact that, in the history of this Nation, "[d]ecisions concerning child rearing, . . . long have been shared with

grandparents or other relatives . . . who may take on major responsibility for the rearing of the children." Moore, 431 U.S. at 505 (plurality).

Further, under Michigan law, the "minor's guardian has the powers and responsibilities of a parent." M.C.L. 700.5215. A state's determination of the legal relationship between a guardian and the ward is relevant to the analysis as to whether a liberty interest is present. See, Smith, 431 U.S. at 844-845, n. 51 (noting that, under New York law, N.Y. Dom. Rel. Law, Sec. 110, adoption is the legal equivalent of parenthood) and 846-847, n. 54 quoting Bennett v. Jeffreys, 40 N.Y. 2d 543, 552 n. 2., 356 N.E. 2d 277, 285 n. 2 (1976) (under New York law, in relation to a natural parent, a third-party custodian does not have "some sort of squatter's rights in another's child").

II. The Process Due.

"[M]inimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Vitek v. Jones, 445 U.S. 480, 491 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982).

The extent of the procedures that are due, in any context, are based on the 3-prong test of Mathews v. Eldridge, 424 U.S. 319, 335 (1974):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the

additional or substitute procedural requirement would entail. See, e. g., Goldberg v. Kelly, supra, at 263-271

Petitioner Fisher contends that both the government's interest and the private interest are advanced by stringent procedures that ensure a decision, as to the custody of the minor ward, is based on a "trial like" hearing where a decision is based on the minor's interests. Custodial rights have been deemed, at least in the context of the parental custody, of such importance as to require procedural protections not normally available when less important interests are at risk. See, Santosky v. Kramer, 455 U.S. 745 (1982) (in order to terminate parental rights, Due Process requires allegations of neglect to be proved by the clear and convincing evidence standard); Little v. Streater, 452 U.S. 1 (1981) (Due Process requires paternity blood test to be paid for by the state when putative father is indigent; M.L.B. v. S.L.J., 519 U.S. 102 (1996) (Due Process and Equal Protection require state to finance production of transcript, for purposes of appeal, to indigent parent who had parental rights terminated in civil proceeding).

Petitioner Fisher contends that, at a minimum, the procedural protections, applied in Wolff v. McDonnell 418 U.S. 539 (1974) and related decisions, for property interest such as the deprivation of a prisoner's good time credit should be applicable herein. The interest in blood-related guardianship is at least as important as the interest good time credits at issue in *Wolff*. At a minimum, the procedural protections applicable to good time credits should have been applied herein. The protections provided by *Wolff*, and related cases, usually include: (a) advanced written notice of the hearing, the proposed violation and the basis for the violation, Wolff, 418 U.S. at 563-567; (b) an opportunity to

call witnesses and present evidence, id; and (c) a requirement that there is "some evidence" to support the decision by the adjudicating entity. Superintendent, Mass.Corr. Inst. v. Hill, 472 US. 445, 455 (1985).

First, Petitioner Fisher was given no notice that the Probate Court would consider terminating her guardianship at the September 27, 2002, proceeding. In many settings, specific notice of actions that are being contemplated and the basis for the proposed actions are a requirement of Due Process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985) (in pre-deprivation employment context, "[p]roviding notice of both the ***charges*** against an employee, ***and the proposed action*** based on those charges is necessary . . .."); Wolff, 418 U.S. at 564 (advanced written notice of the charges upon which good time credits may by forfeited).

Adequate notice of the proposed action and its basis allows a party to meet any evidence related to the matter and adequately respond. "Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact. See *In re Gault, 387 U.S. 1, 33-34, and n. 54 (1967)."* Wolff, 418 U.S. at 564. In the case at bar, the termination of guardianship was abrupt, without pre-proceeding notice and apparently due to the Probate Court's desire to expedite a visitation schedule.

Also, there should have been a "trial like" proceeding, at least to the same extent required by Wolff. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970) (citations omitted). The hearing should also include the presentation of witnesses and evidence. See, Wolff, 418 U.S. at 563-567. When important interests are at stake, a full evidentiary hearing is necessary.

Finally, no evidence was taken at the September 27, 2002, in relation to the child's best interest. This is the prime

criteria, deemed important by the State of Michigan, for termination of a guardianship. M.C.L. 700.5208(2)(a)&(b); M.C.L. 700.5101(a). Any decision that was made had to have been based, at the very least, on "some evidence" that would allow a rational finder of fact to determine that the criteria, necessary for the deprivation of interest, was present. See, Superintendent, Mass.Corr. Inst. v. Hill, 472 US. 445, 455 (1985).

In Stanley v. Illinois, 405 U.S. 359 (1972), the Court found a violation of Due Process in a decision-making process which did not address the factor which the state deemed important — the fitness of a parent to raise his child. Illinois merely presumed that all unmarried fathers were unfit parents. Deprivation of a property or liberty interest "without reference to the very factor (there [in Bell] fault in driving, here fitness as a parent) that the State itself deemed fundamental to its statutory scheme" violates Due Process. Stanley, 405 U.S. at 653 citing Bell v. Burson, 402 U.S. 535 (1971).

In a number of contexts, Due Process has required rational consideration of the factors deemed important by the State. Zinermon v. Burch, 494 U.S. 113, 127, 134 (1990) (procedures must ***"ensure compliance with the statutory standard"***) (emphasis added); Zinermon, at 127 interpreting Parham v. J.R., 442 U.S. 584, 606-607 (1979) ("determination by neutral physician whether ***statutory admission standard is met*** required before confinement of child in mental hospital") (emphasis added); Goldberg v. Kelly, 397 U.S. 254 (1970) (it is an ***"elementary requirement"*** that the "decisionmaker's conclusion as to a [welfare] recipient's eligibility must ***rest solely on the legal rules*** and evidence adduced at the hearing.") (emphasis added); Wolf v. McDonnell, 418 U.S. 539, 558 (1974) (when a state's statutes indicate that good time credits may only be rescinded for "serious misconduct", "the ***determination***

whether such behavior has occurred becomes critical" and a Due Process hearing is required in order to make this specific determination) (emphasis added); Vitek v. Jones, 445 U.S. 489, 489-490 (1980) (a person's liberty interest mandates "that adverse action will not be taken against him ***except upon the occurrence of specified behavior"***) (emphasis added); Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (any deprivation of a liberty interest requires the "decisionmaker . . . to base its decisions on objective and ***defined criteria"***) (emphasis added); Kentucky v. Thompson, 490 U.S. 454, (1989) (state creates protected interests "by mandating the outcome to be reached upon a finding that the relevant criteria have been met"); Hewitt v. Helms, 459 U.S. 460, 471 (1983) (protected interest exists when adverse action of "administrative segregation will not occur absent specified substantive predicates"); Morrissey v. Brewer, 408 U.S. 471, 483-485 (1972) (Due Process requires finding a violation of specific condition of parole before parole may be revoked); see also, Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48, 59 (1922) cited approvingly, by analogy, in Goldberg, 397 U.S. at 271 ***("express finding" of relevant factors, as defined by the statute,*** is "indispensable" to valid action of agency) (emphasis added).

CONCLUSION

WHEREFORE, for all the above reasons, Petitioner prays that the Court grant the writ of certiorari.

Respectfully submitted,

Dated:

Timothy M. Holloway
Attorney for Petitioner

APPENDIX

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STATE OF MICHIGAN
PROBATE COURT
COUNTY OF WAYNE

LETTERS OF GUARDIANSHIP

FILE NO. 2002-651094-GM

In the matter of SARA TATIANA NADIA FOX
373-27-5121, A MINOR.

To: SHALAAN K.FISHER
1834 OXFORD
GROSSE PT WOODS MI 48236

1. You have been appointed by will by the court as GUARDIAN OF A MINOR of the person named above.

2. Having filed an acceptance of trust, you have the care, custody, and control of that person:

a. together wtth all authority and responsibilities granted and imposed by law,

b. except as follows:

c. as to the following powers and responsibilities only: THE FIDUCIARY MAY NOT RELOCATE THE MINOR OUT OF THE STATE WITHOUT PROBATE COURT AUTHORITY. You may receive monthly income only and NOT withdraw money from financial institutions.

3. These letters of guardianship expire on (date blank).

07/24/2002 _____/S/_____

Date Judge HON. MARTIN T. MAHER

ATTORNEY:

NO ATTORNEY

I certify that I have compared this copy with the original on file and that it is a correct copy of the whole of such original, and this date, these letters are in full force and effect.

07/24/2002 _____/S/_____
Krystal V. Bailey - Deputy Probate Register

EXCERPTS FROM THE TRANSCRIPT OF SEPTEMBER 27, 2002 PROCEEDING IN WAYNE COUNTY PROBATE COURT - RE: TERMINATION OF GUARDIANSHIP

[AFTER THE JUDGE REQUESTED THE PARTIES AND ATTORNEYS TO DISCUSS VISITATION OFF THE RECORD]

* * *

THE CLERK: Recalling the matter of Sara Fox.

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THE COURT: Back on the record.

Have the attorneys had an opportunity to talk?

MR. SHIFFMAN: I think we have, and if I may be the spokesman.

We agree as to the decedent estate, counsel and I. He suggested two law firms; I will undertake the referral to two law firms of the potential PI case or med-mal and see what happens.

As to visitation, I think we have agreed to alternating weekends commencing at 10:00 a.m. on Saturdays until 6:00 p.m. on Sundays; and on Wednesday from 6:00 p.m. to 8:00 p.m.

The points of difference, judge, are logistically. I suggested the Michigan State Police Post in Oak Park, which is half the distance – no chance for confrontation – being fair to all parties. Counsel suggested that one of the family members drop her off or another family member. And I can only tell you as an officer of the court that will cause burden some problems. The Michigan State Police will be happy to

do it.

I've measured it logistically and it is halfway between both parties and I think that's a good beginning and ending point. Counsel can tell you why he objects.

MR. McCARTY: Your Honor, if I may.

THE COURT: Go-ahead.

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MR. McCARTY: Christian and Andrea Fisher, sitting behind me, is a great uncle and great-niece of Sara, and they're halfway between the two parties. That would be a more amicable drop-off place for the child. And they can be there to mediate the drop-off as well to make sure there is not a conflict going on as opposed to in a parking lot, your Honor, passing a baby.

I don't mean to say it crassly but that's basically what you're doing, is passing a baby in a parking lot. At least this is in a more civil situation, and also there is a control situation here, too, of a family member. And they are all relaed to each other and they should be able to neutralize any problems.

THE COURT: What is your client's objection to that?

MR. SHIFFMAN: Judge, none of these parties get along and he's here to testify on somebody's behalf. I was suggesting, and I've had it done regularly, where we go right into the Michigan State Police post; there's a giant, big lobby there and there's a desk sergeant and there's chairs. That's a wonderful impartial place.

THE COURT: Counsel, what is your position?

MR. McCARTY: I have no position other than a neutral drop-off is utterly unnecessary.

THE COURT: Mr. McCann.

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MR. McCANN: Your Honor, I'm bewildered by the fact that these parties can't get along long enough to even just drop the child off. Obviously, the court is going to set a short time frame for the discovery that a couple of weekends at the Michigan State Police post won't be detrimental to the child.

THE COURT: What's your names, please?

MR. FISHER: Christian Fisher.

THE COURT: And Mr. Fisher, how are you related to either this lady or this lady?

MR. FISHER: I am Shalaan's – I am their brother.

THE COURT: Is it a fair state that these ladies don't get along, is that correct?

MR. FISHER: On occasion they don't get along.

THE COURT: Is it your statement that you don't get along with your brother? Answer that question. Do you get along with your brother or not?

MS. FISHER: His wife is the problem.

THE COURT: Okay. What I'm going to do is I'm going to remove you as the guardian.

Would you substitute-in as temporary guardians until this matter can be resolved?

MR. FISHER: Yes.

* * *

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTIAN FISHER and ANDREA FISHER,
Petitioners-Appellees,

-v- Case No. 04-405143-AV

SHALAAN FISHER, Hon. Warfield Moore, Jr.
Respondent-Appellant.

ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this:
OCT 19 2004

PRESENT: HON. WARFIELD MOORE, JR.
Circuit Judge (Rubberstamped)

The Court being advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS ORDERED that the order of the Wayne County Probate Court appointing Christian and Andrea Fisher as permanent co-guardians of the minor child is AFFIRMED,

HON. WARFIELD MOORE, JR.
Circuit Judge (Rubberstamped)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTIAN FISHER and ANDREA FISHER,

Petitioners-Appellees,

-v- Case No. 04.405143-AV

SHALAAN FISHER, Hon. Warfield Moore, Jr.

Respondent-Appellant.

OPINION

I. Introduction

This is an appeal from an order of Wayne County Probate Court Judge Martin T. Maher appointing Christian and Andrea Fisher as permanent co-guardians of Sara Tatiana Nadia Fox (minor child). For the reasons more fully explained below, this Court will affirm.

II. Family Members

Tamara Shalisaand Alexandra Fox (nee Murphy)-late wife of Scott Fox, mother of the minor child, daughter of Shalisaand Chiaramonti, sister and sister-in-law of Keith and Nicole Taylor, great nie of Christian and Andrea Fisher and Shalaan Fisher

Scott Fox-widowed husband of Tamara Shalisaand Alexandra Fox (nee Murphy) and natural father of the minor child

Christian and Andrea Fisher, son and daughter-in-law of Shalisaand Chiaramonti (sic) (is really son and daughter-in-law of Maria Fisher), brother and sister-in-law of Shalaan Fisher, uncle and aunt of Tamara Shalisaand Alexandra Fox (nee Murphy) and great uncle and great aunt of the minor child

Shalaan Fisher - daughter of Shalisaand Chiaramonti (sic) (is really daughter of Maria Fisher), sister and sister-in-law of Christian and Andrea Fisher, aunt of Tamara Shalissaand Alexandra Fox (nee Murphy) and Keith and Nicole Taylor and great aunt of the minor child

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Shalisaand Chiaramonti - mother of Tamara Shalisaand Alexandra Fox (nee Murphy) and Keith Taylor, maternal grandmother of the minor child, sister and sister-in-law of Christian and Andrea Fisher, sister of Shalaan Fisher.

Keith and Nicole Tavlor - brother and sister-in-law of Tamara Shalissaand Alexandra Fox (nee Murphy), uncle and aunt of the minor child, son and daughter-in-law of Shalisaand Chiaramonti, nephew and niece of Christian and Andrea Fisher and Shalaan Fisher

III. Chronology

October 7, 1999-	Tamara Shalisaand Alexandra Fox (neeMurphy) marries Scott Fox
December 20, 2001-	Tamara Shalisaand Alexandra Fox (nee Murphy) gives birth to the minor child

May 15, 2002-	Tamara Shalisaand Alexandra Fox (nee Murphy) dies from a drug overdose at age 25
June 24, 2002-	petition filed by Shalaan Fisher in Wayne County Probate Court for probate and/or appointment as personal representative of the estate of Tamara Shalisaand Alexandra Fox (nee Murphy)
June 26, 2002-	petition filed by Shalaan Fisher in Wayne County Probate Court for appointment as guardian of the minor child
July 24, 2002-	hearing held before Judge Maher; Shalaan Fisher appointed as temporary guardian of the minor child
August 7, 2002-	hearing held before Judge Maher on petition to terminate or modify temporary guardianship of Shalaan Fisher filed by Scott Fox
September 27, 2002-	hearing held before Judge Maher on petitions to terminate or modify temporary guardianship of Shalaan Fisher filed by Keith and Nicole Taylor and Shalisaand Chiaramonti; Shalaan Fisher

removed as temporary guardian;

Christian and Andrea Fisher substituted as temporary co-guardians

November 26, 2002- petitions to terminate or modify temporary guardianship of Shalaan Fisher filed by Keith and Nicole Taylor and Scott Fox dismissed

December 20, 2002- hearing held before Judge Maher; Christian and Andrea Fisher request appointment as permanent co-guardians of the minor child

January 6, 2003- written appointment of Christian and Andrea Fisher as co-guardians of the minor child executed by Scott Fox; subsequent objection by Shalaan Fisher

March 6, 2003- appointment of Christian and Andrea Fisher as co-guardians of the minor child withdrawn by Scott Fox; failure to appear for hearing on withdrawal by Scott Fox; withdrawal of Scott Fox's attorney; whereabouts of Scott Fox unknown

March 21, 2003- hearing held before Judge Maher on request for appointment as permanent co-guardians made by Christian and Andrea Fisher

December 10, 11,12 of 2003
January 29, 30 of 2004 trial held before Judge Maher; Christian and Andrea Fisher appointed

as permanent co-guardians of the minor child

February 20, 2004- instant appeal filed

IV. Standard of Review

The standard of review on appeal in cases in which a probate court sits without a jury is whether the probate court's findings are clearly erroneous. In re Bennett Estate. 255

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Mich App 545, 549 (2003). A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding, id.

V. Arguments
1. Due Process
A. Notice/Hearing

At the outset, Shalaan Fisher argues that her due process rights were violated in contravention of MCL 700.5219 because she did not receive notice of the nature of the proceedings held on September 27, 2002, namely Keith Taylor's petition to terminate or modify her guardianship, and she was removed as temporary guardian of the minor child without a hearing. Shalaan Fisher claims that she thought the hearing held on September 27, 2002 was only for purposes of a pretrial on Scott Fox's petition to terminate her guardianship.

This Court is unpersuaded by Shalaan Fisher's initial argument. The statutory provision relied upon by Shalaan

Fisher governs the proceedings surrounding a petition for removal of a guardian. Significantly, it requires notice of a hearing on a petition for removal of a guardian to the guardian and a hearing on the petition. Shalaan Fisher does not dispute that notice of a hearing on September 27, 2002 was sent to her, albeit on the petition to terminate or modify her temporary guardianship filed by Shalisaand Chiaramonti. Thus, this Court is satisfied that Shalaan Fisher had notice of the type of proceedings that were to be conducted on the date in question. Further, insofar as Shalaan Fisher was represented by an attorney on that date, at which time a hearing was actually held, this Court finds that she was afforded an opportunity to be heard.

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B. Record

Shalaan Fisher also contends that she was denied her due process rights insofar as the record which was made is not capable of being reviewed by this Court. In particular Shalaan Fisher claims that there are 342 inaudibles in the trial transcripts.

As aptly noted by the parties, the issue is whether a meaningful review may be undertaken based on the record evidence. Given that the vast majority of the trial transcripts contain testimony which is comprehensible and, thus, substantially complete, this Court is satisfied that the requisite review will be afforded.

2. Best Interests of the Child

Finally, Shalaan Fisher challenges Judge Maher's finding that it was in the best interests of the minor child to

appoint Christian and Andrea Fisher as permanent co-guardians.

A. Applicable Law

This case is controlled by the Estates and Protected Individuals Code, MCL700.1101 et seq. The specific applicable language of the statute provides:

(a) "Best interests of the minor" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(i) The love, affection, and other emotional ties existing between the parties involved and the child.

(ii) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue educating and raising the child in the child's religion or creed, if any.

(iii) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the

Page 5

laws of this state in place of medical care, and other material needs.

(iv) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(v) The performance, as a family unit, of the existing or proposed custodial home.

(vi) The moral fitness of the parties involved.

(vii) The mental and physical health of the parties involved.

(viii) The child's home, school, and community record.

(ix) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.

(x) The party's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents.

(xi) Domestic violence regardless of whether the violence is directed against or witnessed by the child.

(xii) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or parenting time.

MCL 700.5101.

B. Judge Maher's Decision

Here, Judge Maher ruled from the bench following the presentation of testimony and arguments of the attorneys, making specific findings of fact regarding each of the

foregoing factors. In particular, Judge Maher found that the parties were equal with respect to five factors and that Christian and Andrea Fisher predominated as to seven factors. As

indicated above, a review of Judge Maher's factual findings is properly conducted under the clearly erroneous standard. In re Bennett Estate, supra. Mindful of the standard of review, this Court will examine those findings with regard to the governing factors.

1. Factor i - love. affection, and other emotional ties existing between the parties involved and the child

In determining factor i, the love, affection, and other emotional ties existing between the parties involved and the child, Judge Maher found that the parties were equal because he believed that they equally loved the minor child, and that there were no more emotional ties existing between Christian and Andrea Fisher and the minor child than emotional ties existing between Shalaan Fisher and the minor child (Trial Transcript, p 697).

2. Factor ii - capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue educating and raising the child in the child's religion or creed, if any

Judge Maher also found that the parties were equal as to factor ii, the capacity and disposition of the parties to give the minor child love, affection, and guidance and to continue educating and raising the minor child in the minor child's religion or creed, if any, given the age of the minor

child and the absence of any testimony about religion (Trial Transcript, p 697).

3. Factor iii - capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs

Additionally, Judge Maher determined that the parties were equal regarding factor iii, the capacity and disposition of the parties to provide the minor child with food, clothing, medical care or other remedial care, and other material needs, on the ground that the parties were equally able to furnish the minor child with food, clothing, medical care or

other remedial care, and other material needs (Trial Transcript, p 698).

4. Factor iv - length of time the child has lived in a stable, satisfactory environment,and the desirability of maintaining continuity

As to factor iv, length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity, Judge Maher found in favor of Christian and Andrea Fisher since the minor child was only with Shalaan Fisher for a two-month time period when Shalaan Fisher was the temporary guardian from July 24, 2002 to September 27,2002, whereas the minor child had been in the continuous care of Christian and Andrea Fisher from the later date and there was no testimony of anything negative about the couple (Trial Transcript, p 698).

5. Factor v - performance, as a family unit. of the existing or proposed custodial home

Judge Maher found that with regard to factor v, performance, as a family unit, of the existing or proposed custodial home, Christian and Andrea Fisher prevailed insofar as their family unit had been in existence longer than the family unit of Shalaan Fisher (Trial Transcript, pp 698-699).

6. Factor vi - moral fitness of the parties involved

Judge Maher also found in favor of Christian and Andrea Fisher as to factor vi, moral fitness of the parties involved, because while Shalaan Fisher was acting as a fiduciary, i.e., the personal representative of the estate of Tamara Shalisaand Alexandra Fox (nee Murphy), she improperly gave property belonging to the estate to the baby-sitter (Trial Transcript, p 699)

7. Factor vii - mental and physical health of the parties involved

In determining factor vii, mental and physical health of the parties involved, Judge

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Maher found that although the physical health of the parties was fairly equal and the mental health of Christian and Andrea Fisher was satisfactory, the mental health of Shalaan Fisher was troublesome (Trial Transcript, pp 699-700). Specifically, Judge Maher found that Shalaan Fisher had a serious psychological disorder, and that she was an untruthful, "sneaky" person suffering from alcohol, anger

and control problems (Trial Transcript, pp 700-702). Consequently, Judge Maher found in favor of Christian and Andrea Fisher on factor vii.

8. Factor viii - child's home. school, and community record

With respect to factor viii, the minor child's home, school, and community record, Judge Maher found that the parties were equal because there was no such record (Trial Transcript, p 702).

9. Factor ix - child's reasonable preference, if the court considers the child to be of sufficient aoe to express a preference

Judge Maher further found that the parties were equal regarding factor ix, the minor child's preference, since the minor child was too young to express a preference (Trial Transcript, p 702).

10. Factor x - party's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents

In determining factor x, the parties' willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents, Judge Maher found for Christian and Andrea Fisher on the ground that they were "doing an excellent job" (Trial Transcript, p 703). Judge Maher also relied on this basis for removing Shalaan Fisher as temporary guardian of the minor child (Trial Transcript, p 703).

11. Factor xi - domestic violence

Regarding factor xi, domestic violence, Judge Maher found in favor of Christian and Andrea Fisher because although Shalaan Fisher had a history of domestic violence, there was no such history where Christian and Andrea Fisher were concerned (Trial Transcript, p 702).

12. Factor xii - other factors

Finally, as to factor xii, other factors, Judge Maher found that Christian and Andrea Fisher prevailed since he determined that Shalaan Fisher was not a credible witness (Trial Transcript, p 704). In addition, Judge Maher was concerned that Shalaan Fisher exhibited symptoms of what he described as "deep psychological problems," and was mentally unstable as well as physically dangerous (Trial Transcript, pp 704-705). On the other hand, Judge Maher found that Christian and Andrea Fisher were very credible and were good parents (Trial Transcript, p 705).

C. Analysis

Upon a careful review of the record, this Court finds that Judge Maher properly resolved the credibility issue after judging the demeanor of the witnesses, notably Christian and Andrea Fisher and Shalaan Fisher. This Court further finds that Judge Maher appropriately relied on Shalaan Fisher's history of domestic violence, and the number of problems associated with Shalaan Fisher, i.e., alcohol, anger and psychological, in making his factual findings. Aside from the five factors where Judge Maher found equivalency, Christian and Andrea Fisher prevailed on seven factors. Significantly, Shalaan Fisher did not predominate on any one factor. Under these circumstances, this Court is of the

opinion that there was sufficient evidence to establish that it was in the best interests of the minor

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child for Christian and Andrea Fisher to be appointed as her permanent co-guardians and thus, that Judge Maher's decision was not clearly erroneous. 1

VI. Conclusion

For the foregoing reasons, this Court will affirm the order of the Wayne County Probate Court appointing Christian and Andrea Fisher as permanent co-guardians of the minor child.

HON. WARFIELD MOORE, JR.
Circuit Judge (Rubberstamped)
OCT 1 9 2004 (Rubberstamped)

DATED:

This Court notes that review of Judge Maher's decision under an abuse of discretion standard has been urged by Shalaan Fisher. Even when applying that standard of review, however, the result would be the same for all the above reasons.

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Court of Appeals, State of Michigan

ORDER

In re Sara Tatiana Nadia Fox

Docket No. 258993

LC No. 04-405143-AV

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion to file a reply brief is GRANTED.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 18 2005 /S/

Date Sandra Schultz Mengel
Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

August 12, 2005

128992

IN RE SARA TATIANA NADIA FOX, Minor.

CHRISTIAN FISHER and ANDREA FISHER,
Petitioners-Appellees,

v

SC:128992
COA: 258993
Wayne CC: 04-405143-AV
Wayne PC: 2002-651094-GM

SHALAAN FISHER,
Respondent-Appellant.
/

On order of the Court, the application for leave to appeal the May 18, 2005 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.
s0809

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 12, 2005 /S/
Inger Z Mayer Deputy Clerk

Order

Michigan Supreme Court
Lansing, Michigan

January 30, 2006

128992(23)

IN RE SARA TATIANA NADIA FOX, Minor.

CHRISTIAN FISHER and ANDREA FISHER,
Petitioners-Appellees,

v

SC: 128992
COA: 258993
Wayne CC: 04-405143-AV
Wayne PC: 2002-651094-GM

SHALAAN FISHER,
Respondent-Appellant.
/

On order of the Court, the motion for reconsideration of this Court's order of August 12, 2005 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 30, 2006

/S/
Corbin R. Davis
Clerk